

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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ORIGINAL

74-1410

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

against

ANDREW FUREY,

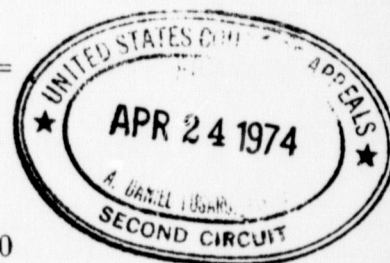
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

FUREY & MOONEY,
Attorneys for Appellant,
600 Front Street,
Hempstead, N. Y. 11550
(516) 538-6200.

EDWARD JOHN BOYD V,
Acting United States Attorney for
Eastern District of New York,
Attorney for Appellee,
225 Cadman Plaza East,
Brooklyn, N. Y. 11201
(212) 596-5700.



PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

-----X

UNITED STATES OF AMERICA,

Appellee,

against

ANDREW FUREY,

Appellant.

On Appeal From the United States District Court for the
Eastern District of New York.

-----X

RELEVANT DOCKET ENTRIES

- 6/21/73 Information filed
- 6/21/73 Before Judd, J.-Deft present with counsel-Deft signs form agreeing be treated as a juvenile offender.
- 11/27/73 Magistrate's file 73N2243 and 72M51 inserted into criminal file 73CR608
- 12/13/73 Before BARTELS, J. - Case called-Deft and counsel John Dwyer present. Deft moves to dismiss on the grounds that is has been over 6 mons. Decision reserved-Motion to be submitted in writing-case adjd to 12-20-73 at 4:30 P.M. for motion.
- 12/18/73 Notice of motion to dismiss the indictment, inspection, etc filed
- 12/20/73 Affidavit of D. DePetrus filed.
- 12/24/73 Notice of Readiness for Trial filed.
- 12/24/73 Before Dooling, J. Case called-Deft and counsel present-Deft after being advised of his rights consents to being tried as a juvenile delinquent-Hearing Ordered and both sides rest-Decision reserved.
- 12/27/73 By Dooling, J. Memorandum and Order filed that motion for an order dismissing the juvenile proceedings is denied-And that alterantive motion to produce for inspection certain documents is denied, etc.
- 1/2/74 Before DOOLING, J. - Case called - Deft juvenile and counsel present-Deft juvenile moves to suppress letter, etc.-Hearing ordered and begun on motion to suppress-Ordered and begun-Hearing contd to 1-3-74.
- 1/3/74 Before DOOLING J - Case called - deft Juvenile & Counsel R. Mooney present- Hearing resumed-Govt rests - Motion to suppress is denied Parties stipulate that record of suppression hearing to constitute the record of adjudication- hearing concluded-Findings on record- Court finds that the delinquency charge was committed by the deft and that he is a juvenile delinquent-bail continued-sentence adj without date.
- 1/21/74 Judgment received from the Court of Appeals filed - Ordered that a stay pending determination of said petition be denied. In view of this ruling the petition is dismissed as moot.

RELEVANT DOCKET ENTRIES

- 3/1/74 Before Dooling J - case called - adjd to 3-8-74 (sentence of Andrew Furey)
- 3/8/74 Before Dooling, J. - case called - Deft and counsel - On the finding that the deft is a juvenile delinquent he is committed until he reaches the age of 21 (deft advised of his right to appeal) The deft will be released pursuant to the provisions of T-18, U.S.C. Sec. 3148 and 3146(a)(4) upon the execution of asurety bond of \$5,000.00 provided that the notice of appeal is filed today and the case be brought on for hearing in the U. S. C of A on the earliest possible date set by the court on prompt application to the court for a hearing date.
- 3/8/74 Judgment and Commitment filed - certified copies to Marchal
- 3/8/74 Notice of Appeal filed
- 3/8/74 Docket entries and duplicate of notice of appeal mailed to the Court of Appeals.
- 3/19/74 3 stenographers transcripts filed (dated Jan 2, Jan.3 and Mar 8, 1974
- 3/22/74 Stenographer's transcript for 6/21/73 filed.

INFORMATION.

EJB:DAD:om
F. #725,647

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 CR 608

UNITED STATES OF AMERICA

-against-

ANDREW FUREY,

Defendant.

JUNE 21 1973

PM

INFORMATION

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

No. (18, U.S.C., §5031,
Fed. Juv. Del. Act)

THE UNITED STATES ATTORNEY CHARGES:

ANDREW FUREY

is a juvenile delinquent within the statutes of the United States and particularly the Juvenile Delinquency Act, in that on or about the 19th day of December 1972, within the Eastern District of New York, he did knowingly and intentionally possess with intent to distribute approximately one and one-quarter (1-1/4) pounds of opium, a Schedule II narcotic drug controlled substance in violation of Title 21, U.S.C., §841(a)(1). (Title 18, United States Code, Section 5031, Federal Juvenile Delinquency Act.)

Robert A. Morse
UNITED STATES ATTORNEY

I, ANDREW FUREY, the above-named juvenile, having been duly apprised of my Constitutional rights and the consent and penalty provisions of the Federal Juvenile Delinquency Act, do hereby consent that the UNITED STATES OF AMERICA, by ROBERT A. MORSE, United States Attorney for the Eastern District of New York, proceed against me as a juvenile delinquent pursuant to the provisions of the Federal Juvenile Delinquency Act.

Dated: Brooklyn, New York
June 21, 1973

Andrew Furey
ANDREW FUREY

SEARCH WARRANT.

Form A. O. 92 (Revised Oct. 1962)

Search Warrant

United States District Court

EJB:DAD:las

FOR THE

EASTERN DISTRICT OF NEW YORK.

District Judge
U.S. ~~Magistrate~~
Docket No.

Case No.

UNITED STATES OF AMERICA

v.

3 Jeffrey Lane
North Babylon, New York

Defendant.

SEARCH WARRANT

To any U. S. Marshall or special agent of the United States Bureau of Customs

Affidavit having been made before me by William Mc Mullan, assigned to the
United States Bureau of Customs.that he ~~is positive~~ that ~~on the premises known as~~ 3 Jeffrey Lane,
North Babylon, New York

in the Eastern District of New York

there is now being concealed certain property, namely quantities of opium

have concealed property

which are being possessed with intent to distribute contrary to Title 21, U.S.C.,

have given alleged grounds for search and seizure

841 (a) (1).

and as I am satisfied that there is probable cause to believe that the property so described is being
concealed on the ~~premises~~ above described and that the foregoing grounds for application for issuance
of the search warrant exist.You are hereby commanded to search forthwith the ~~place~~ named for the property specified, serving
this warrant and making the search ~~in the daytime~~ and if the property be found
there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written
inventory of the property seized and return this warrant and bring the property before me within
ten days of this date, as required by law.

Dated this 19th day of December 19 72

/s/ Anthony Travia
U.S. ~~Magistrate~~
District Judge

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the magistrate or judge is satisfied that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41.)

SEARCH WARRANT

- Taken from premises 3 Jeffrey St
- 1) Approx 1 lb opium & $\frac{1}{4}$ lb. suspected hashish
 - 2) Various papers
 - 3) Set smoking pipes believed to contain residue of hashish
 - 4) Approx 3 oz. of suspected marijuana
 - 5) One scale
 - 6) wrappings from package containing opium

executed 12/19/72 12:30 pm
William W. Muller
Special Agent

AFFIDAVIT FOR SEARCH WARRANT.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

-----X

UNITED STATES OF AMERICA,

against

3 Jeffrey Lane, North Babylon, New York,

Defendant.

-----X

Eastern District of New York, ss:

WILLIAM MCMULLAN, being duly sworn, deposes and says that he is a Special Agent of the United States Bureau of Customs, duly appointed according to law and acting as such.

Upon information and belief, there is presently being concealed within the premises known and described as 3 Jeffrey Lane, North Babylon, New York, within the Eastern District of New York, quantities of opium, a Schedule II narcotic drug controlled substance, which is being possessed with intent to distribute in violation of Title 21, U.S.C., 841 (a) (1).

The source of your deponent's information and the grounds for his belief are:

AFFIDAVIT FOR SEARCH WARRANT

(1) Information received from the United States Customs Mail Detention Center that a package was mailed into the United States from Pakistan and addressed to Andrew Furey, 3 Jeffrey Lane, North Babylon.

(2) Information received from United States Customs laboratory that, upon analysis, the substance contained in the package was opium weighing approximately 1 1/4 pounds.

(3) Information received from the United States Postal Service that Andrew Furey does reside at 3 Jeffrey Lane, North Babylon, New York.

(4) Information received from the United States Postal Service that a controlled delivery of the package was made on December 19, 1972 at 3 Jeffrey Lane, North Babylon, New York, and that Andrew Furey signed a receipt for the package.

WHEREFORE, your deponent requests that a search warrant issue to any United States Marshall or special agent of the United States Bureau of Customs authorizing him or them to enter with proper assistance the premises 3 Jeffrey Lane, North Babylon, New York, and there to

8a

AFFIDAVIT FOR SEARCH WARRANT

search for and seize quantities of opium, a Schedule II
narcotic drug controlled substance, which are being
possessed in violation of law.

Sworn to before me this
19th day of December 1972

United States District Judge
Eastern District of New York

U.S.C.

E.D.N.Y.

NOTICE OF MOTION TO DISMISS PROCEEDING.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court before the Honorable John Dooling on the 20th day of December, 1973, at 4:30 P. M. for an order dismissing the proceeding for failure to bring the case to trial, or in the alternative for an order requiring the government to produce for inspection and copying all documents taken from the home of defendant, and for such other and further relief as this Court deems just and proper.

Dated: Hempstead, New York
December 14, 1973

JAMES M. FUREY
A member of the firm of
FUREY & MOONEY
Attorneys for Defendant
Office and P. O. Address
600 Front Street
Hempstead, New York 11550
(516) 538-6200

TO:

HON. EDWARD J. BOYD, V
United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

AFFIRMATION OF JAMES M. FUREY IN SUPPORT OF MOTION
TO DISMISS.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

JAMES M. FUREY, an attorney, admitted to practice in the State of New York, affirms under the penalty of perjury:

The defendant was arrested and arraigned and was thereafter admitted to bail on December 20, 1972.

At the time that the defendant was released, I was advised by Mr. DePetrìs that he was going to apply for permission to prosecute the defendant as an adult and that I would be hearing from him.

I heard nothing further with regard to this defendant until I received a letter a few days before June 21, 1973, at which time it was suggested that I appear before Judge Judd on that date to consent to be prosecuted as a juvenile.

On that date, I spoke to Mr. DePetrìs and inquired if there was any possibility of working out an agreement on a plea. Mr. DePetrìs advised me that the only thing he was interested in was a plea of guilty to the charges and this was rejected.

AFFIRMATION OF JAMES M. FUREY IN SUPPORT OF MOTION
TO DISMISS

I heard nothing further on this case until I received a call from Judge Dooling's chambers, following which a conference was arranged for December 13, 1973.

It should be pointed out to the court, in the event that the court holds that this action on this motion is discretionary, that the defendant was born on April 23, 1955. He is my nephew, the son of my deceased brother. He was never in trouble before. His arrest in this matter and in the ensuing year since the arrest he has not been in any trouble.

He was employed during this year for approximately eight months at the Whittaker Vinyl Works at 361 Eastern Parkway, Farmingdale, New York. He left that job to go with the Mineola Window Cleaning Company at 1019 Prospect Avenue, Westbury and worked there until November 15th. At that time, he sold his motor vehicle and invested his savings in a clam boat, together with a partner. His investment was \$600.00 and the total cost was \$1,200.00. He has been averaging \$100.00 a week clamming and expects to increase this as his skills increase.

He has contributed \$20.00 per week to his mother during this period and has repaid her for the bail bond premium.

AFFIRMATION OF JAMES M. FUREY IN SUPPORT OF MOTION
TO DISMISS

He has been in regular attendance at the Faith Bible Church on Tell Avenue, Deer Park, New York, under Pastor Bathke.

In April of 1973, he received his high school certificate following special courses which he took.

He is hopeful in the future of enrolling at the State University of Farmingdale to study courses related to mechanics or science.

Under the circumstances, it would seem an appropriate decision to dismiss this case after a lapse of almost a year.

In the event that the case is not dismissed, it is respectfully requested that the prosecution be directed to produce the correspondence taken in the search at the house. It is my belief that there was no intention on the part of the defendant to procure or receive the contraband which was seized.

In the event that some evidence of intent is shown, it is also my belief that the search was improper and in any event, such documents should be suppressed.

A suppression hearing would, of course, be unnecessary in the event that the documents fail to show the necessary intent.

AFFIRMATION OF JAMES M. FUREY IN SUPPORT OF MOTION
TO DISMISS

I affirm under the penalties of perjury that the foregoing is true.

WHEREFORE, defendant prays for an order dismissing the complaint, or in the alternative, directing the production of the fruits of the search of defendant's house and for such other and further relief as this court deems just and proper.

Dated: Hempstead, New York
December 14, 1973

JAMES M. FUREY

AFFIDAVIT OF DAVID A. DePETRIS IN OPPOSITION TO MOTION
TO DISMISS.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

State of New York,
County of Kings,

DAVID A. DEPETRIS, being duly sworn, deposes and
says:

(1) I am an Assistant United States Attorney for
the Eastern District of New York, having been sworn into
that position on August 7, 1972. I make this affidavit
in answer to the defendant Andrew Furey's motion for this
Court to dismiss information 73 CR 608.

(2) On or about December 19, 1972, the defendant
Andrew Furey and his brother Harold Furey were arraigned
before the Honorable Edgar G. Briasch, United States
Magistrate for the Eastern District of New York in West-
bury, New York, on a complaint charging them with a
violation of Title 21, United States Code, Section
841(a)(1).

(3) On December 20, 1972 both defendants were re-
leased on Five Thousand Dollar (\$5,000.00) surety bonds.
On that date, I met with James Furey, Esq., the attorney

AFFIDAVIT OF DAVID A. DePETRIS IN OPPOSITION TO MOTION
TO DISMISS

representing Andrew Furey (his uncle) and discussed the case with him. The discussion related to whether the United States Attorney's Office would treat Andrew Furey as a juvenile or as an adult offender.

(4) On December 29, 1972 the case against Harold Furey was dismissed without prejudice.

(5) For a period of approximately one month thereafter, there was discussion within the United States Attorney's Office and the Department of Justice in Washington, D.C. as to whether or not Andrew Furey should be treated as an adult offender. Finally, a decision was reached that the United States Attorney's Office for the Eastern District of New York would proceed against Andrew Furey as a juvenile if he consented to such treatment.

(6) To the best of my recollection, during March and April of 1973, I had three or four conversations by telephone with either James Furey, Esq. or his associate, Edward Hengeveld, Esq., as to the decision by the United States Attorney's Office to prosecute Andrew Furey as a juvenile and explained to them the necessity for Andrew Furey's consent and the various procedures necessary for such treatment.

AFFIDAVIT OF DAVID A. DePETRIS IN OPPOSITION TO MOTION
TO DISMISS

(7) On June 21, 1973, Andrew Furey consented to be proceeded against as a juvenile delinquent before the Honorable Orrin G. Judd. On said date, I had a conversation with his attorney as to the procedure which would follow Andrew Furey's consent.

(8) From the conversations referred to in paragraphs six and seven, it was my understanding that Andrew Furey would not contest the charge in 73 CR 608. That is to say, there would be a hearing in which the Government would present evidence for the Court to make a determination of Andrew Furey's guilt as a juvenile delinquent.

(9) From June 21, 1973 to the middle of September 1973, there was no activity in this case. In late September 1973, I contacted the Honorable Orrin G. Judd's law clerk to determine when the Court was going to put the case on the calendar. At that time, I was advised that Judge Judd did not have this case. Subsequently, I contacted the District Court Clerk's Office and discovered that the case had been assigned to the Honorable John F. Dooling, Jr. In approximately the third week of October, I contacted this Court's chambers to determine when the case was going to be put on the calendar. At first, the response was that this Court did not have the

AFFIDAVIT OF DAVID A. DePETRIS IN OPPOSITION TO MOTION
TO DISMISS

case, but after some checking, I was advised that this Court had been assigned the case. Subsequent to this conversation, a date was set for a pre-trial conference by this Court.

(10) On December 13, 1973, at the pre-trial conference before this Court, the defendant Andrew Furey moved to dismiss the information 73 CR 608. Although the defendant does not indicate what rule his motion is based upon, the Government must conclude that the defendant's motion is based upon the Plan for Achieving Prompt Disposition of Criminal Cases adopted by this Court pursuant to Rule 50(b), Federal Rules of Criminal Procedure.

(11) I have been ready to proceed with this case since on or about February 19, 1973, the point at which the Government decided to proceed against the defendant Andrew Furey as a juvenile, if he consented to such treatment. Upon information and belief, it would take at most approximately one and one-half days for the Government to conclude its case.

(12) It is the Government's position on this motion that the period in which discussions were had between the United States Attorney's Office and the attorneys for the defendant Andrew Furey, as to the treatment of

AFFIDAVIT OF DAVID A. DePETRIS IN OPPOSITION TO MOTION
TO DISMISS

the defendant as a juvenile delinquent, and the procedures and consequences flowing from such consent, should be excluded in computing the time under Rule 50(b)(5). Further, the Government would submit that the period of time between June 21, 1973 and October 1973 should be excluded because such period of delay was not due to the failure of the Government to proceed, but rather was due to a procedural error made in the United States District Court Clerk's Office in the assignment of the case.

(13) The Government would submit that sufficient grounds existed for tolling the above portions of time under Rule 50(b)(5) so that the motion to dismiss should be denied. In the alternative, the Government would submit that any neglect on the part of the Government was excusable under Rule 50(b)(4).

Wherefore, the Government requests that the defendant Andrew Furey's motion to dismiss information 73 CR 608 should be denied.

(Sworn to by David A. DePetrìs, Assistant U. S. Attorney, December 20, 1973.)

AFFIRMATION OF JAMES M. FUREY DATED DECEMBER 20, 1973
IN SUPPORT OF MOTION TO DISMISS.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

JAMES M. FUREY, an attorney, states:

I had no conversations with Mr. De Petris during March or April prior to receiving his letter to appear before Judge Judd. During this time I was not advised of any conversations had with Mr. Hengeveld or anyone else.

The only conversation which I had with Mr. De Petris concerning a disposition took place in the corridor on the day that the consent was signed before Judge Judd. At that time I inquired of Mr. De Petris as to a possible arrangement, and he advised me that the only thing he was interested in was a plea of guilty as charged. I refused this and was advised that the case would come up in its usual order. I heard nothing further until I received a message from Judge Dooling's Chambers. Mr. De Petris' own affidavit admits that the Government has not been ready to try this case up until now and the information in his affidavit fails to bring this case within any of the exceptions to the Rule in question.

AFFIRMATION OF JAMES M. FUREY DATED DECEMBER 20, 1973
IN SUPPORT OF MOTION TO DISMISS

A reading of the affidavit in opposition shows that the affidavit is insufficient on its face. There is no allegation that the Government ever indicated that they were ready to proceed to trial within six months after the arrest. Nowhere is it alleged that the circumstances of this particular case fall within any of the exceptions as specified in Rule 50, nor does the affidavit allege that at any time, permission for an extension was ever sought or granted by the Court.

I affirm under the penalties of perjury that the foregoing statements are true.

Dated: Hempstead, New York
December 20, 1973

JAMES M. FUREY

MEMORANDUM AND ORDER.

FILED

DEC 27 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA :

- against - :

ANDREW FUREY, . :

Defendant. :

----- X

cc
73-C-608

MEMORANDUM and ORDER

APPEARANCES:

RONALD DE PETRIS, ESQ. (Edward J. Boyd, V, Esq., United States Attorney, of Counsel) for the Government.

RICHARD C. MOONEY, ESQ. (Messrs. Furey and Mooney, of Counsel) for Defendant.

DOOLING, D.J.

Defendant-juvenile moves to dismiss the proceeding for failure to bring the case to trial within six months of the arrest of the juvenile.

On December 19, 1972, the defendant was arrested at his residence and on the same day was charged in a complaint signed by Joseph Corcoran, a special agent of the United States Bureau of Customs, with possessing with intent to

MEMORANDUM AND ORDER

distribute about one and one-quarter pounds of opium, a Schedule II narcotic drug controlled substance in violation of 21 U.S.C. § 841(a)(1). The offense of § 841(a)(1) is a felony punishable by a fine not in excess of \$25,000.00 and imprisonment for a term not in excess of 15 years, plus, in any case in which a sentence of imprisonment is imposed under the section, a special additional parole term of not less than 3 years. Defendant was on the same day arraigned before Magistrate Brisach and was at first held to \$10,000.00 bail to be furnished in the form of a surety bond, a bail amount reduced apparently on the following day to \$5,000.00 to be given in the form of a surety bond. The defendant was released on that day or a day later upon giving the surety bond.

The hearing evidence is clear that the Assistant United States Attorney was soon in touch with the defendant's uncle, James Furey, who is a lawyer, whose practice consists primarily of the trial of civil actions, but who also has had experience in trial in the state courts of criminal actions. Mr. James Furey had at the time no acquaintance with the provisions of the Federal Juvenile Delinquency Act, and it

MEMORANDUM AND ORDER

soon appeared that the defendant was a juvenile. Defendant was born on April 23, 1955.

What occurred between the date of arraignment and the date, June 21, 1973, when the information was filed upon the juvenile's consent is, most unfortunately, a matter of dispute. However, it is clear that it was made apparent that there were two ways of proceeding, first, proceeding against the defendant as an adult offender, which as a matter of law would require an express direction of the Attorney General (as distinguished from the United States Attorney), and, second, procedure against the defendant as a juvenile delinquent, which would require the consent of the defendant. The recollection of the Assistant United States Attorney is that the matter of which way to proceed was submitted to Washington, and the recollection of defense counsel is that, explicitly or implicitly, the Assistant United States Attorney gave defense counsel the impression that the Assistant United States Attorney was seeking authorization to proceed against the defendant as an adult.

In any event, it appears that it was not until February or early March that the matter of which way the

MEMORANDUM AND ORDER

Government would propose to proceed had been cleared with Washington; the determination was that the Attorney General would not direct procedure by an indictment if the defendant assented to juvenile procedure.

Again in this period, there may have been limited contact between counsel, and, again, their recollections are at variance. The Assistant United States Attorney's recollection is that he definitely got the impression that the proceeding would not be contested; counsel for the defense have the very different recollection that the United States Attorney would not accept a plea of any kind except guilty as charged. The Assistant United States Attorney's recollection is that he outlined the normal juvenile procedure in the district, which tends to obliterate the distinction between contested and uncontested juvenile proceedings since even where the juvenile and counsel indicate that there will not be a contest, a hearing is conducted to make sure, through an evidentiary showing, that the juvenile did in fact transgress the law. Defense counsel insists that he did not learn of these matters until December.

MEMORANDUM AND ORDER

In any event on or about June 18, 1973, the Assistant United States Attorney sent a letter to defense counsel to the effect that the matter would be on for consent to proceed against the defendant as a juvenile on June 21, 1973, before the Honorable Orrin G. Judd. The practice under the Individual Assignment and Calendar Rules of the Eastern District is that the Miscellaneous Judge conducts juvenile consent procedures under 18 U.S.C. § 5033 and then keeps the case as assigned judge. See Rule 5(a)(10). Defense counsel insists that the letter of June 18, 1973, was the only notice he ever had of what was forthcoming, although such a letter might seem to presuppose enough earlier discussion to warrant the Assistant's expectation that there would be a consent. On the 21st of June the consent proceedings took place before Judge Judd. The information charging juvenile delinquency was filed on June 21 and to it was appended the defendant's consent to juvenile procedure.

The rule of the Eastern District is clear that juvenile cases must go before the Miscellaneous Judge for the execution of consent and the filing of the information which thereupon initiates the case and that, by exception,

MEMORANDUM AND ORDER

the juvenile cases are not randomly assigned as are all other cases but remain with the judge who supervised the taking of the consent; the general theory is that the importance of the consent procedure counsels the advisability of having the same judge continue with the case throughout. For some inexplicable reason the case was not assigned to Judge Judd and exactly when it was randomly assigned is not clear. It was, however, before September 1, 1973, assigned to the undersigned.

For whatever reason, no Notice of Readiness was filed by the United States Attorney and the case was not called up for action by the undersigned. However, in October of 1973 the Assistant United States Attorney inquired of the undersigned about the status of the case, and an initial conference date satisfactory to counsel was set up for December 13th. On that date the defendant announced, and on December 14th filed, the present motion to dismiss for failure to comply with the rules respecting prompt disposition (Rule 50, and Plan for Achieving Prompt Disposition of Criminal Cases).

The Assistant United States Attorney has stated, and there is no reason to doubt, that the Government has at all

MEMORANDUM AND ORDER

times been ready for trial. The case appears to be one presenting no particular trial problems from the Government's point of view, its witnesses are available, and no trial problems have at any time been anticipated. There would be considerable difficulty here in finding that there was an adequate communication of explicit notice to the district judge that the case was ready for trial, and the omission to employ the usual form of Notice of Readiness leaves it quite uncertain whether that was done within six months after the Attorney General advised that he would not require that the defendant be proceeded against as an adult. However, the confusion over the assignment of the case away from the judge who took the consent in part excuses the failure of formal procedures, and an additional circumstance is that, again, there is no reason to doubt that the Assistant United States Attorney believed that there would not be a consent even though the defense counsel believed that the Government was unprepared to make any concessions and was requiring a plea of guilty and that, therefore, the case would have to be tried in a full dress way. Such a misunderstanding is quite possible since, as the Assistant United States Attorney has pointed out as a witness in the case, it is

MEMORANDUM AND ORDER

difficult to tell whether a juvenile case is proceeding without contest or not; there is always an evidentiary hearing, the juvenile is always represented by counsel, and there is always some interrogation by defense counsel. There is, again, ground for misunderstanding since the general federal practice, at least in the Eastern District, leaves no genuine room for negotiation over the disposition of a juvenile case. The very nature of a juvenile proceeding leaves nothing to negotiate about. 18 U.S.C. § 5034 does not distinguish underlying offenses; in a sense every juvenile case is identical whether the underlying charge is one, as in the present case, in which a fearful sentence may be imposed, or one (e.g., a Dyer Act charge) in which a fairly limited sentence is the maximum sentence possible in the case of an adult.

No purposive delay by the Government has occurred. Inadvertence and administrative confusion compounded by clerical omissions on the parts of the Assistant United States Attorney, the undersigned and the Clerk's office have caused the delay. No advantage has accrued to the Government certainly from the delay. Marked advantage has accrued to the defendant, who, if found to be a delinquent cannot be

MEMORANDUM AND ORDER

committed beyond his 21st birthday; each moment of delay in hearing reduces the maximum term of the juvenile's commitment or probation. *

The case is one in which, if it is within Rule 4 of the Plan, falls into the class of cases in which the six months limitation period would be extended because the delay has been occasioned by exceptional circumstances within the idea of Rule 5(h).

However, June 21st, 1973, is the base-line date for this case. On that date for the first time the defendant was charged as a juvenile delinquent. The notice of readiness was filed on December 21, 1973, and on December 13, 1973, the Government unequivocally advised defendant and the Court that it was ready and willing and anxious to proceed. At the hearing of the motion on the late afternoon of December 20th, the Court advised counsel that the juvenile proceeding could be heard either in the days immediately following Christmas or in the days immediately following New Years day. Defense counsel chose the latter date, reserving their protest against the conduct of any proceedings in the case. The case will, therefore, be heard on January 2, 1974, on the basis that the Government was ready within six months of June 21,

MEMORANDUM AND ORDER

1973 and that the case was set down for a hearing before the expiration of the six month period and in effect on the first open date acceptable to defense counsel.

Under 18 U.S.C. §§ 5031 and following, a juvenile's commission of an act in violation of the law of the United States (other than a capital offense) is juvenile delinquency. It is not either a misdemeanor or a felony. Juvenile delinquency admits of no degrees and of no differences in the kind of rehabilitational or penological treatment that follows upon a determination that a juvenile is a delinquent. For example, In Ivan V. v. City of New York, 1972, 407 U.S. 203, the Court spoke of " . . . the essentials of due process and fair treatment that must be afforded at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult (underscoring supplied)." As the Court pointed out in McKeiver v. Pennsylvania, 1971, 403 U.S. 528, 541, juvenile proceedings are sui generis, neither criminal nor civil in their full implications, and the juvenile is not constitutionally entitled to a jury trial.

MEMORANDUM AND ORDER

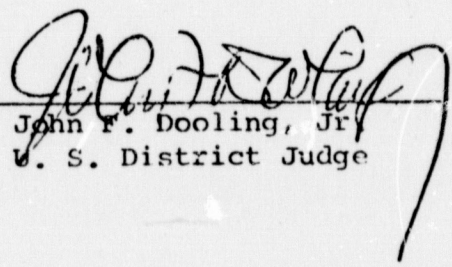
In the present case the felony complaint upon which the defendant was arrested has completely lapsed. No indictment followed upon it. Once the defendant, by his consent, permitted the juvenile proceedings to go forward, the risk of indictment for the felony, and exposure to the fearful punishment that attaches to it, were totally removed. The felony charge was disposed of on June 21st, and a new and very different case addressed to a different aim was then initiated.

Accordingly, it is

ORDERED that the motion for an order dismissing juvenile proceedings for failure to bring it earlier to trial is in all respects denied, and the alternative motion, for an order requiring the Government to produce for inspection and copying certain documents allegedly taken from the defendant's home, is denied as having become moot through the production of the material on request at the hearing on December 20, 1973.

Brooklyn, New York

December 27, 1973


John F. Dooling, Jr.
U. S. District Judge

JUDGMENT AND COMMITMENT DATED MARCH 8, 1974.

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK.

On this 8th day of March, 1974 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant having been duly apprised of his rights and the consent and penalty provisions of the Federal Juvenile Delinquency Act, does consent to being tried as a juvenile delinquent and the Court having found the defendant guilty of violation of Title 18, U.S. Code, Sec. 5031, Federal Juvenile Delinquency Act, in that on or about Dec. 19, 1972, the defendant, did knowingly and intentionally possess with intent to distribute approximately one and one-quarter pounds of opium, a Schedule II narcotic drug controlled substance in violation of T-21, U.S. Code, Sec. 841(a)(1) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

JUDGMENT AND COMMITMENT DATED MARCH 8, 1974

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative until he reaches the age of 21. The defendant will be released pursuant to the provisions of T-18 U.S.C. Sec. 3148 and 3146(a)(4) upon the execution of a surety bond of \$5,000 provided that the notice of appeal is filed today and the case be brought on for hearing in the U.S. Court of Appeals on the earliest possible date set by that court on prompt application to the court for a hearing date

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN F. DOOLING, JR.
United States District Judge

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

Please take notice that ANDREW PAUL FUREY, the above named defendant, hereby appeals to the United States Court of Appeals for the Second Circuit, from each and every part of a judgment entered on March 8, 1974, by the Honorable John F. Dooling, Jr., which judgment found the defendant ANDREW PAUL FUREY a juvenile delinquent pursuant to the provisions of Title 18, United States Code, §5031 *et seq.*, and pursuant thereto committed the defendant to the custody of the Attorney General until said defendant shall reach the age of twenty-one (21) years.

Dated: Brooklyn, New York
March 8, 1974

Yours, etc.

JAMES FUREY
Attorney for the Defendant
600 Front Street
Hempstead, New York 11530
Tele. (516) 538-6200

Services of three (3) copies of
the within is
hereby admitted this day
of , 197

Attorney for

3 copies received
this day
Laurie H. Hume

APR 24 11 04 AM '74

CLERK OF NEW YORK

